COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUHICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C.,	)	
Complainant,	)	
v.	)	D.T.E. 02-47
VERIZON NEW ENGLAND, d/b/a VERIZON MASSACHUSETTS,	)	
and	)	
WESTERN MASSACHUSETTS ELECTRIC CO.,	)	
Respondents.	)	

MOTION OF FIBER TECHNOLOGIES NETWORKS, L.L.C.,
FOR CLARIFICATION AND RECONSIDERATION

Fiber Technologies Networks, L.L.C., respectfully requests that the Department reconsider its Order of Dismissal without Prejudice dated December 24, 2002 ("Order"). It files this motion both to achieve a reversal of some or all of the holdings reached in the Order and also to express the nature and significance of the matters at stake in this proceeding, which has been revealed through events related to court proceedings occurring after the filing of the Complaint in this case. As will be demonstrated below, either the utilities that are parties to this proceeding are relying on incorrect sworn testimony before the Hampden Superior Court in an unrestrained attempt to maintain their control over the telecommunications marketplace in western Massachusetts or, if their testimony is true, they have created an extremely serious and widespread threat to

public safety through their administration of the pole plant. Whichever of these alternatives is the actual case, the utilities are damaging the public welfare in a manner that warrants the attention of the Department. Use of incorrect sworn testimony to win a court order enforcing their control of the telecommunications marketplace has the deleterious effect of continuing to deny the residents of western Massachusetts the benefits of good-paying jobs that could be expected to be spurred by the regional deployment of competitive, state-of-the-art, open-access broadband facilities. Construction of pole plant across western Massachusetts in a manner that, as WMECO's sworn court testimony describes it, "present[s] an immediate threat of death or severe bodily injury to employees of WMECO and other companies … and present[s] safety issues to the public at large", entails the endangerment of the western Massachusetts citizenry by utilities under the regulatory control of the Department.

ARGUMENT

A. The Department Should Reconsider All Elements of the Order Resting on the Conclusion that Fibertech's Installation of Facilities Created a Risk to Public Safety.

The Order appears premised, in significant part, on the findings articulated by the Hampden Superior Court in its August 19, 2002, preliminary injunction order. The Department refers, on page 6 of its Order, to "the attachments that pose a hazard to the public", thereby evincing the Department's adoption of a finding that Fibertech's attachments did, in fact, pose such a hazard. The belief that Fibertech created unsafe conditions through its actions, in turn, appears to infuse the entire Order. For example,

although Department's determination to dismiss Fibertech's Complaint without prejudice was based on Fibertech's alleged failure to specify the individual poles or rates, terms, or conditions complained of, the Department went beyond that fully sufficient basis for its decision and devoted the majority of its opinion to establishing other points not necessary to the disposition of the Complaint, such as that a competitive telecommunications company is not licensed to attach to a utility pole until the incumbent local phone company and power company say that it is licensed, and that the Department lacks the power to enjoin utilities from dismantling a competitive provider's facilities. For both legal and practical reasons, however, the Department should not rely on the court's findings.

From a legal perspective, an interlocutory order such as issued on August 19 does not constitute the law of the case and will not be relied upon for future purposes even by the court that issued the order. Interlocutory findings of a court of general jurisdiction especially should not be relied upon by an executive branch agency charged with responsibility over the subject area and possessing expertise on the subject that the court lacks.

From a practical perspective, the Department should not rely on the findings of the Hampden Superior Court because those findings were based on an incomplete, erroneous, and misleading record. In fact, as set forth more fully below, although the court was led by the utilities to conclude that Fibertech's actions created an immediate threat to public safety, the facilities that Fibertech constructed in the Springfield area, and

that Verizon, Western Massachusetts Electric Company ("WMECO"), and Massachusetts Electric Company ("MECO") are seeking the court's approval to dismantle, are superior from the perspective of safety to the facilities previously attached to the poles by these utilities or by others at the direction of the utilities.

1. Background of court's finding that Fibertech created safety hazards

After agreeing with Fibertech to engage in informal discussions regarding both Verizon's concerns regarding Fibertech's attachments in the Springfield area and Fibertech's complaints regarding Verizon's anticompetitive practices, and without notice that such discussions would not be forthcoming, Verizon on Friday, August 9, 2002, served a complaint, filed with the Hampden Superior Court, alleging Fibertech's unauthorized attachment to the poles around Springfield in violation of the terms of the parties' pole attachment agreement and seeking both authorization to dismantle Fibertech's network and approval of its earlier-declared termination of Fibertech's pole attachment agreement. An "emergency" hearing was scheduled for Wednesday, August 14. Verizon's complaint made no specific allegations of safety violations or hazards. Then, approximately three hours before the emergency court hearing was to commence, WMECO served on Fibertech its own complaint, seeking similar remedies as Verizon's complaint but also including sworn testimony that Fibertech's attachments had created numerous threats of immediate death and other injury. It listed 493 alleged conditions, stating that the listed conditions:

> reflect only the violations that present an immediate threat of death or severe bodily injury to employees of WMECO and other companies coming in proximity to such lines to service their equipment, and present safety issues to the public at large.[1]

These conditions were of four types: (1) attachment within 40 vertical inches from the secondary line at the pole; (2) attachment within 30 vertical inches from the secondary line at mid-span between poles; (3) boxing of a pole, including where the pole had already been boxed by Verizon; and (4) use of extension arms to achieve compliance with NESC-prescribed clearance requirements. (Fibertech's installation had resulted in lack of the standard 40-inch clearance on ten (10) poles where no other party had previously breached that space. In addition, by pulling the fiber too tight, Fibertech's contractor had left less than the standard 30-inch mid-span separation between numerous poles, although the contractor had agreed to resag the line, using expansion loops that had been installed, in order to correct these mid-span conditions.[2] The boxing and use of extension arms were consistent with relevant safety codes.[3])

The judge recognized the risk that the late service of WMECO's complaint could deny Fibertech a fair hearing but also acknowledged the force of the allegations of threatened death. He stated:

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[1] Affidavit of John S. Tulloch, Manager of New Services for WMECO, at para. 13.

[2] Verizon and WMECO refused to allow Fibertech to correct these mid-span violations.

[3] Boxing entails attaching a cable to the opposite side of the pole from that to which the majority of other cables are attached. This technique permits a company to attach even though inadequate space exists on the pole side where the majority of attachments are located and thereby enables the company to avoid the burdensome cost of replacing the pole and paying for the transfer of all other facilities to the new pole. As RCN related to the FCC during the proceeding through which Verizon's gained approval under Section 271 to provide long-distance service in Massachusetts, Verizon boxed poles frequently, including 20 % of the poles in Quincy and 46% of the poles in Medford (although it prohibited RCN from boxing any poles and now seeks to benefit from sworn testimony that boxing of poles threatens immediate death).

> [I]n reading the material submitted by Verizon and looking at the letters, while there's lots in there that speaks in generalities about safety violations and the type of safety violations on various of these poles, I didn't see anything until Western Mass. Electric made its filing that literally went pole by pole, identifying the violations and categorizing them in terms of threat to human life or something less.
>
> If I were Fibertech, it would be that last affidavit received – probably yesterday – that I would be most concerned about and would want an opportunity to deal with.
>
> I suggest to you, really, as a judge, that's what I'm most concerned about, as well. If there is immediate threat to life or property that needs to be corrected immediately, that's one thing. Most of these other issues don't seem to present the kind of urgency in my mind that that does.[4]

Noting that he was about to embark on a two-week vacation at the end of the week, the judge expressed his inclination to grant a two-week continuance, "by which time Fibertech can have a reasonable opportunity to meet the very specific allegation that [WMECO] [has] made". WMECO's attorney responded that, "because of the number of poles and number of violations involved here, we cannot even effectively warn people, the consumers of these poles, of this condition … I came back from Rhode Island … because I feel that this is something that the Court needs to deal with this week. We cannot push it forward."[5]

Thus faced with allegations of immediate threats of death and told that the matter could not wait even two weeks, the court conceded to the utilities and

[4] Transcript of August 14, 2002, Motion for Preliminary Injunction Hearing before Wernick, J., Hampden Superior Court (hereinafter, "Hearing Transcript") at p. 10.

[5] Hearing Transcript, pp. 14-15.

denied Fibertech's request for a continuance and an opportunity to respond to the allegations regarding safety hazards.[6]

2. Fibertech's facilities are no less safe than other facilities installed by Respondents or at their direction in and beyond the Springfield region.

As the attached affidavit of Wallace Short, Fibertech's Director of Network Operations, attests, the 767 poles to which Fibertech attached in the Springfield area, along a route of approximately 20 miles, contained **238** violations of the National Electric Safety Code either created by the installation of facilities by Verizon, WMECO, or MECO, or by the installation of facilities by companies other than Fibertech at the direction of such utilities. Of these, 76 reflected the absence of the NESC-prescribed 40-inch separation between secondary electric lines and communications lines. In 162 cases the electric lines and another company's communications lines were less than 30 inches apart at mid-span. Mr. Short's affidavit also states that, along a two-mile pole route adjacent to Fibertech's Springfield route, the facilities of NEON, the telecommunications company affiliated with WMECO, are within 40 inches of the electric lines on six poles and are within 30 inches of the electric lines at 15 mid-span locations. (Four of these 21 NESC violations involving NEON facilities are counted among the 238 NESC violations created by the utilities on Fibertech's twenty-mile route.) On this same two-mile route, NEON has used three extension arms, of the type that WMECO has testified create an

[6] The utilities had failed for four weeks prior to the court hearing to respond to Fibertech's request for specific information regarding their alleged safety concerns, which, by the time of the court hearing, were "life-threatening" and necessitated the suspension of due process. After receiving $400,000 from Fibertech pursuant to the court's preliminary injunction order, the utilities waited over four weeks before starting any work to correct the allegedly life-threatening conditions.)

immediate threat of death or serious bodily injury. The attached affidavits of Mr. Short and of Robert Enright, Fibertech's Project Manager in Massachusetts, further attest to the fact that on numerous occasions they have surveyed pole plant administered by the Respondents beyond Fibertech's route and have found that violations of the NESC, boxing, and use of extension arms, all of the type employed by Fibertech in its Springfield installation, are apparent throughout the areas they have surveyed. As Mr. Enright relates, he has never driven down a road in Massachusetts without observing violations of the NESC that are readily apparent on the poles.

The utilities' construction standards applicable to themselves and certain other attachers have consistently allowed both deviation from the NESC and use of boxing and extension arms.

3. Any determination that Fibertech created safety hazards by means of its Springfield installations must be accompanied by acknowledgement of the extensive threat to safety that the utilities have created across Massachusetts.

Put simply, the Respondents in this proceeding either have: (1) acted in an almost unimaginably egregious manner, using incorrect testimony to injure a competitor seeking to enter their market; or (2) they have truthfully testified that immediate death or serious bodily injury is threatened when the NESC's 40-inch standard or 30-inch standard is violated or when a pole is boxed or an extension arm is used and that immediate attention to such a threat is necessary. If the second of these logical alternatives represents the actual case, the Respondents have themselves inflicted this threat on the citizens of Massachusetts to an extent that dwarfs any potential harm created by Fibertech.

Moreover, they have not merely put the public at risk but they neglect the need for immediate correction of the offending conditions and instead persist in their dangerous course to gain competitive advantage by saving the money necessary to carry out such necessary corrections while choosing extraordinarily expensive means of addressing the conditions created by Fibertech.

B. The Department should reconsider the need to rule at this point on whether an applicant for a pole license may be deemed licensed based upon a utility's failure to satisfy the Department's 45-day deadline to license the pole or state what would be required to accommodate the attachment.

The Department has required that pole owners provide access to their poles within 45 days of an applicant's request for access unless access cannot be accommodated for certain specified reasons. Specifically, 220 CMR 45.03(2) provides:

> If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant information supporting its denial, and shall explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

This rule virtually mirrors the federal rule on the subject, which provides:

> If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

47 C.F.R. § 1.1403(b). The Federal Communications Commission has interpreted this regulation to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted". In re Application of Bellsouth Corporation, FCC 98-271, 13 FCC Rcd 20599, para. 176 (1998); Cavalier Telephone, LLC v. Virginia Elec. & Power Co., 15 FCC Rcd. 9563, para. 15 (2000).

The FCC's interpretation gives effect to the rule's deadline. Absent the corollary that failure to meet the mandatory deadline results in licensure, a utility could be expected to seek to maintain its market power by unlawfully delaying license applicants and forcing them to expend valuable resources to enforce their clear legal rights. Giving utilities such freedom will put at risk any potential for the deployment of competitive facilities.[7]

Given the critical relationship between the 45-day deadline and the growth of a competitive broadband infrastructure in Massachusetts, the Department should consider the possibility of adopting an interpretation of its rule similar to the interpretation the FCC has given to its virtually identical rule, possibly accompanied by refinement of the federal rule. One area of inquiry regarding the possible adoption of such an interpretation could be the question of how such an interpretation would relate to the Department's interest in ensuring safe pole plant. In this regard, for example, it may be that the

[7] The unlawful delays that a utility imposes are costly to the license applicant, because they deprive the competitor of the revenues it would be earning absent the delays, without affording concomitant relief from operating expenses. Such initial delays are then compounded if the competitor must respect the utility's illegal position pending a formal regulatory determination, because the procurement of such a determination itself takes time. In the case of Fibertech's complaint brought before this Department in the matter of Fiber Technologies Networks, L.L.C. v. Town of Shrewsbury Electric Light Plant, for example, an interlocutory order was issued only after 16 months had elapsed from the date the complaint was filed.

Department, upon consideration, would elect to find the "deemed licensed" rule applicable where no make-ready work is required.[8]

Even Verizon has indirectly acknowledged that a pole is deemed licensed where no make-ready work is required and the 45-day period has lapsed. Before the Hampden Superior Court, Verizon's attorney stated that:

> [T]here are instances in which no make-ready work would be required. In those instances, they would be granted access within the 45 days. We would simply send a notice back saying – and issue a license, and then they would go on the pole.[9]

In light of the fact that Verizon did not once grant a formal license within 45 days of submission of a license application by Fibertech, although a majority of poles were available for attachment without the performance of make-ready work, the license to these poles granted to Fibertech within the 45-day period must have been implicit in nature.

That Verizon must concede that it is deemed to have granted pole licenses within 45 days, at least in some instances, if it has issued no written denial, is established by the commitments it made to this Department as it sought authorization to provide long-

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[8] It was Fibertech's intention to install facilities on the poles in question in this proceeding in a manner fully consistent with the NESC and other industry-wide construction codes. Fibertech is prepared to show that, with the exception of a handful of poles, its installations either complied with such codes or could be brought into compliance with the codes merely by modification of the Fibertech attachment, with no work necessary that would involve other companies' facilities. Therefore, adoption of a rule that a license application is deemed granted if access is not denied within the 45-day period so long as no make-ready work is required would be directly relevant to the disposition of this case.

[9] Hearing Transcript, p. 49.

distance service in Massachusetts. At that time, Verizon stated that it would adhere to the federal rules applicable to access to poles and conduit and would not enforce any provisions in its pole or conduit agreements that were inconsistent with the federal standards.[10]

The Department should reconsider its determination that nothing in its rules suggests that a license application is deemed granted if it is not denied within the allotted 45 days, because such determination unnecessarily frees Verizon from a commitment procured by the Department that is critical to opening Massachusetts to facilities-based competition and that was relied upon by competitive providers as they decided whether to invest in the deployment of facilities in this State.

The Department should reconsider its determination also in order to afford itself the opportunity to hear the views of the parties to this proceeding and possibly the views of other interested parties. Permitting parties to provide information relevant to the subject and to make argument regarding the issue would allow the Department to engage in reasoned decision-making that is difficult without the benefit of such information and argument.

It would promote the interests of justice for the Department to withhold a decision on whether a competitor may be deemed licensed when a pole owner fails to respond to the license application. Fibertech did not seek to achieve inappropriate cost- or time-savings

[10] See Supplemental Comments of Bell Atlantic-Massachusetts to Mass. DTE Evaluation of Verizon-Massachusetts Section 271 Application (May 26, 2000) at pages 39 and 41, fn. 22.

or other unwarranted advantage by simply ignoring the procedures established by the utilities for licensure. Fibertech had applied for pole and conduit licenses two years before it installed its aerial facilities, asserting a legal right pursuant to the Department's regulations. While going through the process established by the utilities for licensure, Fibertech had paid the utilities $964,625.19 in fees for applications, surveys, and make-ready. (This amount is in addition to the $460,000 that the utilities have procured from Fibertech through their lawsuit in Hampden Superior Court.) After the two years and nearly a million dollars paid to the utilities, Fibertech still had not succeeded in making a single pole attachment and was confronting the utilities' ultimatum that it either succumb to their illegal demands for additional, excessive make-ready payments (as set forth in the Complaint) or stay out of the market. At the same time, the utilities' delays had placed Fibertech in breach of its customer contracts, and Fibertech was facing the loss of those customers and, potentially, the loss of its funding. It may be just such a result that is the ultimate goal of the incumbent local telephone companies and the electric companies with telecommunications affiliates as they seek to use their control over poles and conduit to maximize the time and cost involved in deploying competitive facilities. To rule, without reconsideration, that a license applicant cannot be licensed based on utility delays would further cement the ability of such utilities to deprive Massachusetts of the benefits of facilities-based competition.

C. The Department should reconsider its finding that Fibertech failed to identify with sufficient specificity the terms and conditions it claimed to be not just and reasonable.

1. **Violations of the 45 Day Rule.** Fibertech cited in its Complaint that "in almost every case Verizon unlawfully failed to respond in any manner within the 45-day time period, and in many cases have failed to grant or deny access to this date. WMEC only complied with the 45 Day Requirement for 9 of the 410 poles for which Fibertech applied to WMEC". In support of these allegations, Fibertech filed with its Complaint all of Fibertech's Pole Applications for the Springfield Region, and also filed any responses received by the Respondents to these applications. These documents provide clear and specific evidence **on their face** of Respondents failure to comply with the 45 Day Rule for the specific the routes and poles in question. While Fibertech, if requested, would have been (and will be) glad to organize or index these documents in any manner desired by the DTE, Fibertech believes that the specifics of Respondents failure to comply with the 45 Day Rule are fully supported by the exhibits to the Complaint.

2. **Discriminatory Treatment.** Also, while recognizing the DTE's need for specifics, it is important to note that it is not merely any one term of an agreement that Fibertech complains of as being discriminatory, but rather Respondents' entire process for hindering the construction of competitive facilities. Specific examples of Respondent's tactics are listed in Paragraphs 18 and 19 in the Complaint, including that Respondents:

?? Threatened Fibertech with cancellation of applications (and thus the possibility of starting the whole Process over from the start) if Fibertech did not submit to Respondents' excessive make-ready charges;

?? Attempted to extort even higher make-ready charges from Fibertech by delaying and/or threatening to delay make-ready work unless Fibertech agreed to sign a new pole agreement with Verizon that would result in higher make-ready charges;

?? Created a "chase-your-tail" conspiracy of circular departmental requirements whereby in some instances the requirements of one department could not be fulfilled without first meeting the requirements of a second department, which second department would then state that Fibertech had to meet the first department's requirements before the second department would cooperate with Fibertech;

?? Created a "go fish" scheme for conduit applications, whereby Fibertech was denied access to maps and documents regarding conduit availability and was told that it must submit a proposed route and wait for confirmation of whether a duct was available. If duct was not available, Fibertech was basically told to "guess again" and was again denied access to maps and documents that would allow it to determine where available conduit might be.

?? Created "dead end" situations for conduit facilities, where if an available duct was finally found along a certain route, Fibertech then was denied access to maps and documents necessary to determine whether there was adjoining conduit that would allow Fibertech to continue its underground construction; and – despite being denied information regarding adjoining conduit necessary to determine whether the available conduit would connect to any other available conduit, therefore, whether the available conduit would serve any useful function – Fibertech was required by Verizon to either pay make-ready charges related to the available conduit or have its application for that conduit cancelled;

?? Falsely represented that conduit facilities were not available in several instances where they were available – causing Fibertech unnecessary delays and expense;

?? Falsely represented that conduit facilities were available in several instances where they were not – causing Fibertech delays and expense in re-routing;

?? Discriminated against competitive telecommunications providers, in that, upon information and belief, Verizon did not impose on itself or its affiliates the senseless delays and expenses that are imposed on those companies, like Fibertech, subject to the Process.

In candor, Respondents actions have been so egregious as to effectively prevent a detailed recounting of each situation in the Complaint. However, Respondents should not be permitted to benefit from their wide-spread anticompetitive conduct by having the Complaint dismissed.

D. The Department should reconsider its finding that Fibertech failed to identify with sufficient specificity the poles and conduits to which it was denied access.

By attaching Exhibit D to the complaint in this matter, Fibertech satisfied the requirement set forth in 45 CMR 45.04(2)(e)(4) that it attach to its complaint a copy of each pole attachment license application with respect to which the complaint pertained. Each such application identified with specificity the poles for which licenses were being sought, and inclusion of the applications therefore identified with specificity all the poles with respect to which Fibertech was complaining. Similarly, by attaching Exhibit E to its complaint, Fibertech satisfied the requirement set forth in 45 CMR 45.04(2)(e)(4) with respect to the conduits for which it had applied. These 115 different applications each identified with specificity the conduit routes and segments about which Fibertech was lodging its complaint.

Respectfully submitted,

FIBER TECHNOLOGIES NETWORKS, L.L.C.
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Dated: January 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that on January _____, 2003, I served a copy of the foregoing on the Respondents, by delivering a copy of the same **via personal delivery or first class mail** to:

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